A **SHAMIM REZA ABDUL SAMAD**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: B-05-71-07]
C 5 FEBRUARY 2009

CRIMINAL PROCEDURE: *Trial - Failure to cross-examine prosecution witnesses on relevant issues - Whether counsel incompetent - Whether incompetence of counsel grounds for setting aside conviction and*
D *death sentence - Whether flagrant or gross incompetence must be shown*

CRIMINAL PROCEDURE: *Trial - Murder - Third party defence - Whether trial judge erred in failing to consider existence of third party at scene of crime*

E ***CRIMINAL LAW:*** *Murder - Appeal against conviction and death sentence - Whether counsel incompetent in conduct of defence - Whether trial judge erred in failing to consider existence of third party at scene of crime*

F The appellant was convicted and sentenced to death for the murder of one Zuriyati Othman under s. 302 of the Penal Code ('PC'). The appellant now appealed on the ground that the incompetence of his counsel in failing to cross-examine the prosecution witnesses on relevant issues had deprived him of a fair
G trial. Also, that the learned judge erred in law and in fact in failing to consider the existence of a third party at the scene of the crime.

Held (dismissing the appeal; affirming conviction and sentence)
H **Suriyadi Halim Omar JCA delivering the judgment of the court:**

(1) The learned judge was satisfied beyond reasonable doubt at the end of the defence case that it was the appellant who
I killed the deceased. Her ladyship had rejected the defence that a third party had committed the offence. This finding of fact did not turn solely on the credibility of witnesses but

buttressed by other evidence. The evidence showed that the appellant was found with the deceased in a room that was locked from within. No one else was in the room and the irresistible conclusion was that only the appellant could have committed the offence. That was an incriminating circumstance and a factor that could not have escaped the mind of the learned judge. (para 22)

(2) Although no witness stepped forward to categorically state that he saw the appellant stabbing the deceased, the learned judge was right when she arrived at the finding that the appellant was the person responsible for the stabbing. All the evidence and circumstances cumulatively and unerringly pointed to the involvement of the appellant. (para 25)

(3) There was no evidence of the appellant seriously challenging any of the prosecution's witnesses at the stage of the cross-examination let alone testing his defence at the earliest opportunity, *ie*, at the prosecution's stage. Without such a challenge, the credibility of the prosecution's witnesses remained intact. (para 26)

(4) The third party defence was an afterthought and merited only the minimum of consideration. The "defensive wounds" purportedly on the appellant were self-inflicted because the forensic expert who had examined the appellant found the injuries not defensive. The submission of the existence of a third party was a defence of bare denial that could not be accepted. (paras 27 & 28)

(5) The intention of the appellant when he stabbed the deceased was to kill her despite the want of admission or confession from him. The totality of the evidence had established the intention ingredient, *ie*, the nature of the injuries sustained by the deceased, the number of wounds, the weapon used and the like. Section 304 PC was not applicable in this case. The very nature of the wounds was sufficient to cause death. The cuts, stabs and wounds were not just to frighten the deceased but to terminate her life. Further, the learned judge did direct her mind to s. 304 PC before convicting the appellant under s. 302 of the same. (paras 29, 31 & 32)

(6) The issue of a lawyer's incompetence is not without precedent but the level of incompetence demanded by the courts is high in that it has to be flagrant. Anything short of a high degree

will not persuade a court to set aside a conviction. In the present case, the approach and line of questioning of counsel was not improper or preposterous. The voluminous cross-examination of the prosecution's expert witnesses and detailed submission merely made short shrift of the shallow proposal of the appellant. The learned judge would have still found the appellant guilty on the overwhelming evidence adduced by the prosecution. Even if counsel was incompetent, but if that incompetence had no impact on the trial, the conviction must be sustained. As to the presence of a third party in the room, the learned judge did meticulously lay down the reasons for her rejection of that defence. It followed that the appellant was not deprived of the necessities of a fair trial and he was afforded every proper opportunity to put his defence to the court. (paras 39, 42, 48, 49, 50 & 51)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit atas kesalahan membunuh seorang Zuriyati Othman di bawah s. 302 Kanun Keseksaan ('KK') dan dihukum mati. Perayu kini merayu atas alasan bahawa ketidakkompetenan peguamnya apabila gagal menyoal balas saksi-saksi pendakwaan atas isu-isu relevan, telah menyebabkan beliau tidak mendapat perbicaraan yang adil di mahkamah. Dikatakan juga bahawa yang arif hakim khilaf di sisi undang-undang dan fakta apabila gagal menimbang kewujudan seorang orang ketiga di tempat kejadian.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim telah berpuas hati di luar keraguan munasabah di akhir kes pendakwaan bahawa perayulah yang membunuh si mati. Yang arif hakim juga telah menolak pembelaan bahawa seorang orang ketiga melakukan jenayah tersebut. Dapatan fakta ini tidak semata-mata dicapai berdasarkan kebolehpercayaan saksi-saksi tetapi dikukuhkan oleh bukti-bukti lain. Keterangan menunjukkan bahawa perayu didapati berada bersama si mati di dalam bilik yang dikunci dari dalam. Tiada orang lain berada di di bilik tersebut dan konklusi yang tidak dapat tidak adalah bahawa hanya perayu sahaja yang boleh melakukan jenayah tersebut. Ini adalah satu halkeadaan yang menunjukkan kebersalahan dan satu faktor yang tidak mungkin dilepas pandang oleh yang arif hakim.

(2) Walaupun tiada saksi datang ke depan dan berkata secara khusus bahawa beliau nampak perayu menikam si mati, yang arif hakim betul dalam mencapai konklusi bahawa perayulah yang bertanggungjawab atas tikaman-tikaman. Semua keterangan dan halkeadaan secara keseluruhannya dan tanpa syak lagi menunjuk kepada keterlibatan beliau.

(3) Tiada keterangan yang menunjukkan bahawa perayu dengan secara serius telah mencabar mana-mana saksi pendakwaan di peringkat soalan balas, apa lagi untuk menguji pembelaan beliau di peringkat awal, iaitu di peringkat pendakwaan. Tanpa cabaran sedemikian, kebolehpercayaan saksi-saksi pendakwaan adalah tidak terjejas.

(4) Pembelaan adanya orang ketiga adalah suatu renungan kemudian perayu dan hanya berhak kepada pertimbangan yang minima. "Kecederaan-kecederaan defensif" yang dikatakan terdapat pada perayu adalah dibuat oleh perayu sendiri kerana pakar forensik yang memeriksa perayu mendapati kecederaan tersebut tidak berbentuk defensif. Hujah tentang kewujudan orang ketiga hanyalah satu pembelaan kosong dan tidak boleh diterima.

(5) Niat perayu apabila menikam si mati adalah untuk membunuh walaupun tanpa adanya pengakuan atau pengakuan-salah beliau. Keseluruhan keterangan telah menyerlahkan ingredien niat, iaitu dari sifat kecederaan yang dialami si mati, jumlah kecederaan, senjata yang digunakan dan sebagainya. Seksyen 304 KK tidak terpakai kepada kes di sini. Dari sifat kecederaan yang dialami sahaja sudah mencukupi untuk menyebabkan kematian. Perbuatan meluka, menikam dan mencederakan tersebut tidak dilakukan untuk menakut-nakutkan si mati tetapi adalah untuk menamatkan riwayatnya. Selain itu, yang arif hakim juga telah mengarahkan fikirannya kepada s. 304 KK sebelum mensabitkan perayu di bawah s. 302 KK.

(6) Isu kekompetenan peguam bukanlah tidak ada precedent tetapi tahap ketidakkompetenan yang diperlukan mahkamah adalah tinggi dalam ertikata ia haruslah sesuatu yang begitu menjolok mata. Apa jua yang tidak mencapai tahap ini tidak akan mendorong mahkamah untuk mengenepikan sabitan. Dalam kes semasa, pendekatan dan cara menyoal saksi tidaklah boleh dikatakan tidak wajar atau tidak masuk akal. Soalan balas yang sebegitu banyak yang diaju kepada saksi-saksi pakar

pendakwaan serta hujah-hujah terperinci yang dikemukakan menjadikan dakwaan perayu satu dakwaan kosong semata-mata. Yang arif hakim masih tetap akan mendapati perayu bersalah berdasarkan keterangan-keterangan kukuh yang dikemukakan oleh pendakwaan. Jikapun peguam tidak berkompeten, namun jika ketidakkompetenan itu tidak mempunyai impak ke atas perbicaraan, maka sabitan harus tetap dikekalkan. Berkaitan kehadiran seorang orang ketiga di dalam bilik, yang arif hakim dengan telitinya telah menjelaskan alasan-alasan mengapa beliau menolak pembelaan tersebut. Ianya mengikut bahawa perayu tidak disisihkan dari keperluan-keperluan suatu perbicaraan yang adil dan beliau telah diberikan setiap peluang untuk mengemukakan pembelaannya kepada mahkamah.

Case(s) referred to:
Boodram v. The State of Trinidad and Tobago [2001] UK PC 20 ***(refd)***
Chong Ching Yuen v. HKSAR [2004] 7 HKCFAR 126 ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 ***(refd)***
Ku Lip See v. PP [1981] 1 LNS 155 ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 ***(refd)***
Mak Kam Chuen v. HKSAR, FAMC No. 35 of 2001 ***(refd)***
PP v. Ku Lip See [1980] 1 LNS 166 ***(refd)***
Reg v. McLoughlin [1985] 1 NZLR 106 ***(refd)***
R v. Birks [1990] 48 A Cr R 385 ***(refd)***
R v. Clinton [1993] 1 WLR 1181 ***(refd)***
R v. Mo Lee Keun [1993] 1 HKCLR 78 ***(refd)***
Sankar v. The State of Trinidad and Tobago [1995] 1 WLR 194 ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 ***(refd)***
Tulshiram v. State of Maharashtra [1984] Cr LJ 209 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 ***(refd)***

Legislation referred to:
Penal Code, ss. 300, 302, 304

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, p 1387

For the appellant - Datuk N Sivanathan (Tina Ong with him); M/s Sivananthan & Co
For the respondent - Eddie Yeo, AG's Chambers

[Appeal from High Court, Shah Alam; Criminal Case No: 45-65-2002]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This appeal was unanimously dismissed by this panel and had thereupon affirmed the conviction and sentence. The charge against the appellant reads as follows:

> Bahawa kamu pada 9 Ogos 2002 antara jam 11.00 pagi dan 12.00 tengahari di No. 101, Blok A, Kolej Kediaman Meranti, UiTM, Seksyen 2, Shah Alam di dalam Daerah Petaling dalam Negeri Selangor Darul Ehsan telah melakukan kesalahan membunuh, iaitu menyebabkan kematian ke atas ZURIYATI BINTI OTHMAN, NO. KP. 820328-14-5814, dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] In a nutshell the appellant was charged for murdering Zuriyati binti Othman on 9 August 2002 between the hours of 11am and 12 noon at No. 101, Blok A, Kolej Kediaman Meranti, UiTM, Seksyen 2, Shah Alam, in the district of Petaling, Selangor Darul Ehsan. The offence fell under s. 302 of the Penal Code.

[3] The prosecution had called 27 witnesses to establish its case and in brief its evidence adduced reads as follows:

[4] On 9 August 2002, the deceased one Zuriyati bt Othman was found dead by her sister, one Fatimah bt Othman (SP10). The deceased was in a pool of blood on her bed at No. 101, Blok A, Kolej Kediaman Meranti, Seksyen 2, UiTM Shah Alam whilst the appellant seriously injured, was on the floor, also in the same room. The room was locked from inside. According to SP25, who was the investigating officer of the case, he had retrieved a rambo knife (P59) together with its sheath (P60) under a bed at the place of incident. SP23, the forensic expert who carried out the post mortem on the deceased, confirmed the injury to be of the type caused by P59, and death to have been caused by 'multiple stab wounds'.

[5] The deceased's college friends *viz.* SP12, SP13, SP14 and SP15 confirmed having seen the appellant with her before her death. They were also aware of the estranged relationship between them, and had testified that the deceased wanted to end that relationship, but on account of the appellant's threat and violent nature was frightened to do so.

[6] As regards the injuries found on the appellant, SP24 the forensic expert who examined him, testified that they were self-inflicted, and agreeing too that the injuries were of the type made by P59. From a DNA analysis, the chemist (SP22) confirmed that both the DNA of the deceased and the appellant were found on the knife (P59).

[7] Faced with that overwhelming evidence, the learned High Court judge was satisfied that a *prima facie* case had been established, and thereupon called the defence on 19 March 2007. The appellant had chosen to give sworn evidence and thereafter had taken the witness stand. His defence was simple in that a third party had attacked both him and the deceased at the time of incident. He alleged that his wounds were caused in the course of defending himself.

[8] At the end of the defence case the learned judge, based on testimonies of all the witnesses, was satisfied beyond reasonable doubt that the deceased was Zuriyati binti Othman, her death was caused by the appellant, it was intentionally done and with the knowledge that death would ensue as enumerated under s. 300 of the Penal Code, and the incident occured at the place and time as particularised in the charge.

[9] Regarding the identity of the murderer, it was found by the learned judge that it was the appellant who caused the deceased's death. It was incontrovertible that he was found together with the deceased and had the opportunity to cause the stabbings. The learned judge was satisfied that P59 must have been the murder weapon on account of both the DNA of the deceased and the appellant being found on it.

[10] Her ladyship was convinced of the appellant's intention to cause death as reflected by the multiple wounds using P59, as confirmed by SP23. Her wounds were many and deep, with five stab wounds being deeper than 10cms and another ten penetrating between 5cms to 9cms. The injuries could not have been for any other intention but to cause death.

[11] Pertaining to the injuries on the appellant, the learned judge being convinced that there was no one else in the room, concluded that the injuries could only be self-inflicted. She accepted the evidence of SP24 that the type of injuries suffered

by the appellant could not have been caused in the course of defending himself, especially when the injuries were not at an angle, let alone the injuries on his abdomen being focused only on an area measuring 11 x 8cm.

[12] Pertaining to the defence of the existence of a third party, the learned judge commented that at no stage of the prosecution was this defence raised and tested. No prosecution's witness was grilled on this highly relevant issue and hence was an afterthought defence. After an erudite discourse of this issue her ladyship accordingly rejected the 'third party' defence.

[13] The court found that the appellant had the necessary motive to kill the deceased, as confirmed by the notation on the calendar (P15), on which dateline date the deceased and the appellant would decide on the course of their relationship. If the meeting was not fruitful he was ready to die with the deceased.

[14] To regurgitate, at the end of the defence case, and based on the totality of the evidence, the learned judge found that the prosecution had established a case beyond reasonable doubt. She thereupon convicted the appellant and sentenced him to death.

[15] A scrutiny of the memorandum of appeal showed that the learned judge was defaulted for failing to conclude that the incompetence of the assigned counsel had resulted in injustice, on the following grounds:

1.1 the absence of the deceased's blood on the appellant's clothings were never put to the prosecution's witnesses;

1.2 the assigned counsel failed to ask SP22 (forensic expert) as to the absence of the deceased's blood on the appellant;

1.3 the assigned counsel failed to cross-examine SP23 (the forensic pathology) on whether the depth of the wounds could cause the deceased's blood to splatter on an assailant;

1.4 the assigned counsel failed to cross-examine SP10 who heard the deceased shout only once, when there were altogether 25 stab wounds;

A 1.5 the learned judge erred in law and in fact when refusing to consider the existence of a third party; and

1.6 the learned judge erred in law and in fact when concluding that the defence of a third party was an afterthought.

B **[16]** Despite the format of the above memorandum of appeal, a slight shift took place in the approach of the appellant, when learned counsel agreed before us not to lay any blame on the learned presiding judge. To appreciate what transpired during the C appeal we herewith reproduce the relevant exchanges as recorded by us:

> Appellant counsel: Main thrust of the appeal is that the counsel who dealt with the case did not act competently. This issue has not been considered by a Malaysian Court but considered in D several jurisdiction in the Commonwealth.
>
> Court: Did you make a complaint to the Bar Council?
>
> Answer: No.
>
> E Court: Why?
>
> Answer: Remedy to my client. Any remedy here is a retrial-in a situation like this. No quarrel with assigned counsel. But case dealt with by a junior.
>
> F Court: I warn myself, my other judges and you that by taking this course of action you may end up forgetting the perayu's predicament as your focus of attention is the counsel who conducted the trial.
>
> Court: Despite giving opportunity, he still insists on this G approach. ...
>
> The other lawyer was always there ...

[17] Having laid down the perimeters of the appeal the hearing began. At no time therafter did this panel prevent him from taking H this course of action, although we consistently hinted to him to widen the scope of his approach, in light of the nature of the case. Taking the cue from our hints, come the second day of the continued hearing of the appeal, we were lumbered by a supplementary written submission. The appellant had expanded the I scope of his parameters by canvassing in the alternative that the learned judge did not consider whether the offence committed here

fell under s. 304 of the Penal Code or not, but had merely focussed on s. 302 of the Penal Code. Again we did not stop the appellant from submitting this alternative argument.

Our Reasons For Dismissing The Appeal

[18] Having perused the evidence thoroughly we were unable to detect any flaw in the factual finding of the learned judge, appreciation of the law, and whether she had committed any injustice along the way. Every finding of fact was supported by cogent evidence and had successfully produced a talking judgement. We were satisfied that the eventual conviction and sentence of the appellant could not be defaulted in any way.

[19] Before analysing the facts of this case in detail a need arises for us to reproduce ss. 302 and 300 of the Penal Code and in the course of it beef them up wth the necesary explanations. Section 302 of the Penal Code reads:

> Whoever commits murder shall be punished with death.

Under s. 300 of the Penal Code is promulgated that "Except in the cases hereinafter excepted, culpable homicide is murder:

> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

[20] These facts are either undisputed or overwhelming, namely:

i. that the deceased died on 9 August 2002 between 11am and 11.35am. SP8 saw her on that day whilst SP10 spoke to her prior to 11am on the day of incident. In a word prior to 11am on that date the deceased was still alive;

A ii. the appellant was in the same room with the deceased at the material time though had denied his involvement in the killing; and

iii. there was overwhelming evidence that P59 was the murder
B weapon. We were satisfied that P59 was the weapon that was used to stab the deceased, as not only the DNA of the deceased was found on the knife, but was confirmed by SP23 that the wounds could only be caused by a weapon like P59. This weapon which was bloodied was found in the very room
C where the stabbing took place. This witness too in no uncertain terms had said that, this type of knife was not something spontaneously taken from the kitchen of the apartment, but deliberately brought along to stab someone.

D **[21]** With the above ingredients having been explained, only two more ingredients are left *viz.* the identity of the murderer and whether it was an intentional stabbing that fell under s. 300 of the Penal Code. At the outset it must be admitted that the learned judge was in a superior position as compared to us, as she
E had every opportunity to witness the demeanour, conduct and countenance of the witnesses, including the appellant. We only had the cold letters before us. Certainly, it would take more than a mere difference of opinion, for this panel to upset any finding of fact of the learned judge (*Herchun Singh & Ors v. Public Prosecutor* [1969] 1 LNS 52; *Dato' Mokhtar Hashim & Anor v. Public*
F *Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101).

[22] The learned judge was satisfied beyond reasonable doubt at the end of the defence case that it was the appellant who killed the deceased. Her ladyship had rejected the defence that a third
G party had committed the offence. This finding of fact did not turn solely on the credibility of witnesses but buttressed by other evidence (*Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197). To begin with the learned judge had accepted the evidence of SP5, SP6, SP7, SP8, SP9 who came later after SP10 had found the
H deceased in the room which was locked from inside. SP10 had opened the locked room with a duplicate key taken from her room. In the room she found the deceased with the appellant; there was no one else in it. With no one else in the room, the irresistible conclusion was that only he could have committed the
I offence. Being alone in a room locked from inside with the deceased is an incriminating circumstance a factor that could not

have escaped the mind of the learned judge (*Ratanlal & Dhirajlal's Law of Crimes* p. 1387). Without anyone to prevent him from carry out his misdeeds he thus had an easy passage and opportunity to violently subdue and cause the deceased's death. Having read the learned judge's grounds of judgment on this issue we find no reason to disturb it.

[23] Retracing slightly on the defence of the appellant, he had ventilated that a Malay man had entered the room and thereafter stabbed the deceased several times. When attempting to help the deceased he allegedly suffered serious injuries. Certainly he had every right to put his defence in whatever way he likes but at the end of the day it was up to the court to accept or reject such a defence. If his defence was consistent with innocence and a doubt was created in the mind of the learned judge as to his guilt then the appellant must be entitled to the benefit of that doubt.

[24] As stated earlier the learned judge had rejected this third party person defence, and, amongst others opined:

> Setelah meneliti keseluruhan keterangan yang dikemukakan, saya berpuas hati bahawa tidak wujud keterangan yang dapat menyokong cerita tertuduh tentang kehadiran lelaki yang tidak dikenali ...
>
> Setelah meneliti keseluruhan kes, dengan memberi perhatian khusus kepada cerita pembelaan tentang kehadiran orang ketiga yang menyerang mangsa dan tertuduh, saya berpuas hati pihak pendakwa telah membuktikan pertuduhan dengan melampaui keraguan yang munasabah terhadap tertuduh.

[25] Even though no witness stepped forward to categorically state that he saw the appellant stabbing the deceased, we were satisfied that the learned judge was right when she arrived at the finding that the appellant was the person responsible for the stabbings. How could she not decide the way she did when all the evidence and circumstances had cumulatively and unerringly pointed to the involvement of the appellant (*Tulshiram v. State of Maharashtra* [1984] Cr. LJ 209).

[26] We found no evidence of the appellant seriously challenging any of the prosecution's witnesses at the stage of the cross-examination let alone testing his defence at the earliest opportunity ie, at the prosecution's stage. Without such a challenge the credibility of the prosecution's witnesses especially SP10 must

remain intact. Raja Azlan CJ (as His Royal Highness was then) had opined in *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[27] SP10 who testified that she heard the deceased shout out "Alang", had at no time heard the threats and verbal abuses of the alleged third party, as testified by the appellant. For all its worth, if indeed a third party existed, surely the verbal exchanges, physical altercation, kicking of the door, followed by the attempts of the appellant to save the deceased, and concluded by the unbelievable meticulous locking of the door on the way out by the alleged assailant would surely have taken up much time. Yet SP10 missed all this. It is at this stage that the third party factor could have been highlighted when cross-examining SP10. To wind up this issue, similar to the conclusion of the learned judge, we were convinced that this third person defence was an afterthought and thus merit only the minimum of consideration. That being so it follows that the 'defensive wounds' on the appellant were self-inflicted. As Dr. Nurliza Abdullah (SP24) said there were no defensive injuries.

[28] The submission of the existence of a third party, put in another way, is a bare denial defence. The effect of that defence is that he did not kill the deceased. Another person did it. Having read the evidence, and without a single good and sufficient reason, we were unable to accept his bare denial as sufficient to create any doubt in our mind as to the non-existence of a third person let alone his denial of killing the deceased (*D.A Duncan v. PP* [1980] 1 LNS 12; *PP v. Ku Lip See* [1980] 1 LNS 166 and *Ku Lip See v. PP* [1981] 1 LNS 155).

[29] We were also satisfied that the intention of the appellant, when he stabbed the deceased was to kill her, despite the want of admission or confession by the appellant. Without that confession we had no choice but to infer from the totality of the evidence whether the intention ingredient had been established or

not. To arrive at that, as the learned judge did, we had to consider the nature of the injuries sustained by the deceased, the number of wounds, the weapon used and the like. In this case the rambo knife (P59) that was used, is a gruesome and murderous looking weapon, which would guarantee fatal consequences if anyone were to be stabbed by it. In fact a knife by itself is a formidable weapon and thus the inference here is to kill. There was absolutely no reason for the appellant to use that knife on a woman who, as seen from the pictures, would not pose a threat to him. In comparison, the appellant appeared healthy and tall, and definitely superior in strength when compared to the deceased. So why the need to bring along such a knife when visiting the deceased unless he had murder so vile in his heart?

[30] Let us sift through some of the results of the autopsy on the deceased by the forensic expert (SP23). This witness in crystal clear terms had testified that there were no less than 17 cut wounds and 25 stab wounds on the deceased. I reproduce verbatim some of the statements regarding the stab wounds:

(4) Luka ke-4 ... sedalam 5 cm;

(5) Luka ke-5 ... sedalam 8 cm ... dan telah mencederakan bahagian bawah paru-paru kanan dan hati;

(8) Luka tikaman, 7x2 cm sedalam 17 cm ... rongga dada ditembusi ... mencederakan hati ... dan telah mencederakan pembuloh aorta dada;

(10) Luka tikaman ... 8.5 cm dan telah menembusi rongga dan ... hati turut cedera;

(13) Luka tikaman dibahagian tengah atas abdomen ... sedalam 9 cm;

(14) Luka tikaman ... atas abdomen ... sedalam 11 cm. Menembusi perut (stomach) dan mendedahkan kandungan perut;

(16) Luka tikaman sedalam 14 cm;

(19) Luka tikam ... 11 cm ... dinding abdomen telah ditembusi dan usus besar turut cedera.

... Hati simati seberat 1430 gram, mempunyai banyak kesan luka tikaman;

A ... Kecederaan yang paling serius ialah kecederaan ke-8 iaitu luka tikaman yang telah mengenai pembuloh aorta bahagian dada;

... Luka luka lain yang serious ialah kesemua luka tikaman yang telah mencederai hati (liver),

B ... Terdapat juga luka tikaman yang mencederai paru-paru kanan (lung);

Sebab kematian ialah luka berganda (multiple stab wounds).

... Dengan kecederaan kepada simati peluang untuk hidup adalah
C tipis.

[31] The above evidence amplifies the number of cuts and stab wounds, the depth of the knife's penetration, what it injured, and the effect. What can one say from this report except that if a
D singular deep and penetrating knifing of the deceased, and seriously injuring a vital organ could cause death (see injury 8), the series of 25 stabbings were an overkill. By no stretch of the imagination could section 304 of the Penal Code be applicable in this case. The very nature of the wounds here were sufficient in
E the ordinary course of nature to cause death. The cuts, stabs and wounds were not just to frighten the deceased but to terminate her life. As SP23 said, "dengan kecederaan kepada simati peluang untuk hidup adalah tipis (with the injuries on the deceased her chances of survival were slim).

F **[32]** For completeness on this issue, we were satisfied that the learned judge did direct her mind to s. 304 of the Penal Code, before convicting the appellant under section 302 of the Penal Code. This is so as she in the course of preparing the grounds of
G judgment, had taken into account the case of *Tham Kai Yau & Ors v. Public Prosecutor* [1976] 1 LNS 159, as reflected at p. 554 of the records of appeal. There the Federal Court had pointed out the difference between murder and s. 304. After some deliberation the court had set aside the conviction of murder and accordingly substituted it with a conviction under s. 304 of the
H Penal Code. But as we stated earlier by no stretch of the imagination this case could have fallen under s. 304 of the Penal Code.

Incompetence Of Lawyer

I **[33]** The appellant here complained before us that his counsel was incompetent, a state of affairs which had resulted in an unfair trial, and culminating in his conviction. If there were to be any

basis in that complaint, especially in a capital punishment case before us, we could not remain unperturbed but must react to it. If it were well-founded, though no mean task to establish such a serious allegation, the aggrieved party must benefit from the outcome in the event we conclude that the assigned counsel was indeed incompetent. This is so as, if a trial has been compromised by that incompetence, which went to the root of a conviction, a fair trial could not be said to have taken place. Permit us to discuss cases pertaining to this issue. In *Chong Ching Yuen v. HKSAR* [2004] 7 HKCFAR 126, the Court of Final Appeal of the HKSAR, which went to great length to discuss the issue of incompetence of defence counsel, had occasion to remark:

> ... the incompetence of defence counsel had been such as to compromise the fairness of the appellant's trial. Accordingly I, too would allow this appeal to quash the conviction appealed against and set aside the sentence passed pursuant thereto ... the crucial question is whether the appellant had a fair trial.
>
> Certainly defence incompetence can cause or contribute to the creation of a state of affairs in which a conviction has to be regarded as unsafe or unsatisfactory. An appellate court cannot shut its eyes to the unsafe or unsatisfactory state of a person's conviction just because that state was caused or contributed to by his counsel's incompetence. Nor can an appellate court shut its eyes to an error of law against a person just because that error was caused or contributed to by his counsel's incompetence.
>
> In determining whether defence incompetence has rendered a conviction unsafe or unsatisfactory our appellate courts should, in my view, focus firmly on the standard of trial that our system insists upon. As to this standard I have consulted three things. Of these, the first is the relevant parcel of constitutional rights found in the Basic Law and in the Bill of Rights as entrenched by art. 39 of the Basic Law. The second is the traditional standard of the common law. And the third is what I understand that the public expects. Having consulted these three things, I have no doubt that the sort of trial that our system insists upon is a fair trial. This being an imperfect world, one cannot expect perfect trials. But to be effective, a trial must be fair. *If defence incompetence has, all things considered, resulted in the trial being something less than a fair trial, such incompetence constitutes a ground for quashing a conviction.* There is direct correlation between the fairness of a trial and the viability of a conviction.

A

> In my view, these cases support, or at least can be reconciled with, a 'fair trial' criterion for determining whether defence incompetence constitutes a ground for quashing the conviction. This criterion will, I think, serve to determine most if not all cases of this kind.

B

> No appellate court would lightly declare a trial unfair. But where it concludes that a trial was unfair, that leaves little (if any) room for saying in effect that such unfairness did not really matter.

[34] Even though some of the following cases were discussed in C *Choong Ching Yuen*, but as some of the crisp comments uttered are highly pertinent for the current appeal, we deem it fit to reproduce them:

[35] In *Boodram v. The State of Trinidad and Tobago* [2001] UK PC 20, [2002] 1 Cr App R 103, the court opined:

D

> Where counsel's misconduct had been extreme and the defendant had been convicted, the impact of that misconduct on the result of the trial was no longer relevant. The defendant had not had the benefit of due process and the conclusion must be that there E was a miscarriage of justice because there had not been a fair trial of the appearance of one.
>
> The breaches were of such a fundamental nature that the conclusion must be that the defendant was deprived of due process.

F

> Even without embarking on the impact of the breaches, the conclusion must be that the defendant did not have a fair trial. For that reason also the conviction had to be quashed.

[36] In *Mak Kam Chuen v. HKSAR*, FAMC No. 35 of 2001 the G court stated:

> ... the question was whether the conduct complained of has resulted in the accused not getting a fair trial so that the conviction is unsafe or there is a miscarriage of justice.

H **[37]** In *Sankar v. The State of Trinidad and Tobago* [1995] 1 WLR 194 the Privy Council advised:

> In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may I have to quash the conviction and will do so if it appears there has been a miscarriage of justice.

[38] In *Reg. v. McLoughlin* [1985] 1 NZLR 106, the Court of Appeal held: A

> It is basic in our law that an accused person receives a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury ... The present appellant has been deprived of that opportunity and justice has therefore been denied to him. B

[39] Even though this issue of a lawyer's incompetence is not without precedent, the level of incompetence demanded by courts must be high in that it has to be flagrant. Anything short of a high C degree will not persuade a court to set aside a conviction (*R v. Birks* [1990] 48 A Cr R 385; *R v. Mo Lee Keun* [1993] 1 HKCLR 78; *R v. Clinton* [1993] 1 WLR 1181).

[40] In order to arrive at a finding, whether indeed the assigned D counsel was flagrantly incompetent, it necessitates a perusal and discussion of the notes of proceedings and evidence as supplied in the records of appeal. A scutiny of the freshly adduced evidence before us revealed that the Shah Alam High Court had assigned Mr. James George Chelliah of Tetuan James George and E Co. as the assigned counsel. He was assigned way back on 12 July 2005, with the trial beginning on 26 June 2006. He thus had every opportunity and had ample time to prepare the case on behalf of the appellant. As per the notes of proceedings, on the hearing date, only he was present to carry out his assigned duties. F In the course of his application to adduce fresh evidence before us, the appellant canvassed that it was one Mr. Salim Bashir who had conducted almost the whole of the trial proper, including the cross-examination of the key prosecution witnesses. But it was not denied by him that despite the hearing being conducted by G Mr.Salim, Mr. James George was constantly around to guide his junior.

[41] How is the court to decide whether the counsel was flagrantly incompetent or not, or whether this approach of blaming H someone for the conviction was not a last desparate attempt to obtain an acquittal? To resolve this impasse again we need to allude to the notes of proceedings. The first obvious discovery was that the trial was conducted in Malay. Going by the name and being a Malaysian, it must be assumed that the service of Mr. I Salim Bashir was acquired due to his expertise and fluency in the

A Malay language, and in the course of it assisted the assigned counsel. We saw no error there on the part of the appellant's counsel to allow Mr. Salim take conduct of the trial proper subject to his senior's supervision.

B **[42]** The next step we undertook when perusing the notes of proceedings was to determine whether the want of cross-examination of the prosecution witnesses, as expressed in the memorandum of appeal, an indication of the incompetence of the assigned counsel or his assistant. When deliberating on the C approach and line of questioning of the assigned counsel we had no hesitation in concluding that the course of action was not improper or preposterous. Regretfully there was a dearth of explanation why he had pursued this methodology. With the adversarial legal and judicial system currently practised in Malaysia, D it was not within the jurisdiction and purview of the learned trial judge to impose her will, and guide the appellant towards an acquittal, certainly very much to the chagrin of the prosecution. The court in *R v. Mo Lee Keun (supra)* adopting *R v. Birks (supra)* had said:

E

> A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way the system of criminal justice operates.

F **[43]** With two legally qualified counsel at the helm to protect the interest of the appellant, especially when they have asked the right questions, and refrained from so doing when it became unnecessary, for the court to take the role of a third counsel for the appellant surely would be an unacceptable suggestion. If the G appellant changed his defence dramatically at the defence stage, it could only imply that he in reality at the very outset never had a defence, with the afterthought approach being his second last attempt to escape the noose. His last attempt was the allegation of the incompetency of the assigned counsel and or his assistant H before us.

[44] For completeness, let us err on the side of being overly cautious, by speculating why those questions posed in the memorandum of appeal were not asked *viz.* the absence of the I deceased's blood on the appellant's clothings or on his body, whether the depth of the wounds could cause the deceased's

blood to splatter on an assailant, why there was only one solitary scream when there were altogether 25 stab wounds, and lastly the issue of the third party factor.

[45] Any right minded counsel knows that it is the prosecution's duty to establish its case be it at the prosecution's stage or at the conclusion of a full trial. Also an accused person is under no duty to lighten the burden of the prosecution and help get his defence called. Unless an accused person has a death wish he would want the charge against him be dismissed without the defence being called. Needless to say, it was encumbent upon the prosecution in this case to establish at the prosecution's stage that the appellant was in the room at the material time. Any admission by the appellant of the absence of the deceased's blood on his body or clothes, could be taken as an implicit admission of his presence in the room, and that he had all the time to wash away the blood before SP10 barged in into the room. Such an admission would ingratiate him with the prosecution and would pose a huge problem for him if his defence were called.

[46] The failure to question further on why there was only one scream when there were 25 stabbings may not have been due to incompetence but a clever tactical move. It is not improbable that the first stab could have been the fatal one and that solitary stabbing had silenced the deceased for good hence the ensuing silence. Pursuing this point would only exacerbate the appellant's already dire predicament, as any other stabbings after the one that led to the solitary scream, would indicate his murderous intent without a shadow of a doubt.

[47] When reflecting of the possibilities as clarified above in the preceding paragraphs, the tactical move of not wanting to admit being in the room or not pursuing the 'one scream question' thus could never establish the assigned counsel as being flagrantly incompetent. Even if that tactical move had been erroneously taken that cannot be a ground for appeal. In *Chong Ching Yuen v. HKSAR (supra)* the court at p. 144 said:

> It follows, almost inevitably that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently will not provide any grounds for appeal, any more than if such decision had been made by the defendant personally.

[48] These reasonable probabilities would put the appellant's suggestion, as a last ditch attempt to obtain a retrial, to rest once and for all. The voluminous cross-examination of the prosecution's expert witnesses and detailed submission, as reflected in the records of appeal, merely makes short shrift of the shallow proposal of the appellant.

[49] We now touch on the issue of why there was no cross-examination regarding the absence of the deceased's blood on the appellant. It was obvious to us that had the appellant doggedly pursued this matter, and had succeeded in eliciting answers that were favourable to him, he foresaw his involvement in the killing being neutralised. He foresaw answers that would indicate that he never was near the deceased person. Despite that possible expectation, in light of the overwhelming evidence adduced by the prosecution, we were of the view that the learned judge would still have found him guilty. To wind up this issue, it must be borne in mind that even if the assigned counsel had been incompetent, though not so found by us, bottom-line is that if that incompetency had no impact on the trial the conviction must be sustained *(Chong Ching Yuen v. HKSAR (supra)*.

[50] As regards the dissatisfaction of the appellant of the rejection by the learned judge of the presence of a third party in the room, this ground holds no merit as the learned judge did meticulously lay down the reasons for her rejection of this defence. We are bereft of reasons to repeat what the learned judge wrote in her grounds of judgment.

[51] Having sieved through the facts and notes of proceedings before us, we were unable to accept the argument of the appellant that the conviction was unsafe or unsatisfactory, an unfair trial or an appearance of an unfair trial had taken place, that the appellant was deprived of due process, a fundamental flaw in the conduct of a trial existed, and or the counsel's conduct had caused a miscarriage of justice. The appellant was never deprived of the necessities of a fair trial and he was afforded every proper opportunity to put his defence to the court.

[52] Based on all the above reasons we had no compunction in dismissing the appeal and affirming the conviction and sentence.